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OCBC BANK (MALAYSIA) BHD

v.

LIM YEN HUAT

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-22-762-2005]
21 NOVEMBER 2008

C ***CIVIL PROCEDURE:*** *Affidavits - Deponent of affidavits - Application to cross examine - Whether allowed - Rules of the High Court 1980, O. 38 r. 2(3)*

This was an appeal by the defendant against the decision of the senior assistant registrar ('the registrar') dismissing the defendant's application to cross examine the deponent of two affidavits filed by the plaintiff in support of the plaintiff's O. 14 summary judgment application. Briefly, the facts were that the plaintiff was a bank and its claim against the defendant was for the repayment of an overdraft facility which it had granted to the defendant amounting to RM5,100,045.56. The plaintiff's summons in chambers (for the purpose of the O. 14 application) was filed along with the affidavit in support which was affirmed by one Paul Lo Kean Poh. After the defendant had filed his affidavit opposing the application, the plaintiff filed an affidavit in reply also affirmed by the said Paul Lo Kean Poh. In applying to cross examine the deponent Paul Lo Kean Poh, the defendant invoked O. 38 r. 2(3) of the Rules of the High Court 1980. The purpose of the defence in applying to cross examine was to attack the credibility of the deponent of the said affidavits.

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Held: (dismissing the appeal with costs):

(1) Notwithstanding the provision of O. 38 r. 2(3), as a matter of principle, such an application, whether by the plaintiff or by the defendant, should not be allowed in an O. 14 proceeding. For it would defeat the purpose of an O. 14 application for summary judgment if the parties were to be allowed to cross examine the deponents of affidavits. An O. 14 application is meant to be a simple and speedy procedure and not a protracted one – which would be the case if the cross examination of deponents of affidavits were allowed. In an O. 14 application, the defence, in opposing the application,

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need not have to establish facts or to demolish assertions of the plaintiff: all that the defendant needs to do in order to succeed in resisting the plaintiff's application is merely to convince the court that there are triable issues; and this can be accomplished merely by means of adducing material and credible affidavit evidence. (para 12)

Case(s) referred to:
Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1979] 1 LNS 42 ***(dist)***
The Cyprus Popular Bank Limited v. Androulla Michael [1987] CLY 3097 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 38 r. 2(3)

For the plaintiff - KK Chan (SY Oon with him); M/s Shook Lin & Bok
For the defendant - Mohd Alakhir; M/s Dennis Nik & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is an appeal by the defendant against the decision of the learned senior assistant registrar ('the registrar') of 1 March 2007. In her decision, the registrar had dismissed the defendant's application to cross-examine the deponent of two affidavits filed by the plaintiff in support of the plaintiff's O. 14 summary judgment application.

[2] I have dismissed the appeal with costs.

[3] I shall now give my grounds.

[4] The plaintiff is a bank and its claim against the defendant is for the repayment of an overdraft facility which it had granted to the defendant amounting to RM5,100,045.56.

[5] The plaintiff's summons in chambers (for the purpose of the O. 14 application) and the affidavit in support were filed on 2 December 2005. The affidavit in support filed was affirmed by one Paul Lo Kean Poh. After the defendant had filed his affidavit opposing the application, the plaintiff filed an affidavit in reply, also affirmed by the said Paul Lo Kean Poh.

[6] The defendant thereafter filed an application *vide* encl. 12 to cross-examine the said Paul Lo Kean Poh on his two affidavits. This application, however, was dismissed by the registrar.

[7] The defendant then appealed to the judge in chambers.

[8] In applying to cross-examine the deponent Paul Lo Kean Poh, the defendant invoked O. 38 r. 2(3) of the Rules of the High Court 1980 that reads:

> (3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[9] In the present case, the purpose of the defence in applying to cross-examine, as explained in the summons in chambers, is to attack the credibility of the deponent of the said affidavits.

[10] The reasons given by the defendant in his summons in chambers in seeking to cross-examine the deponent are as follows:

> (a) Adalah sesuatu yang meragukan bagi deponen Plaintif iaitu Paul Lo Kean Poh yang telah menegaskan di dalam afidavit-afidavit yang diikrarkan olehnya pada 2.12.2006 dan 24.1.2006 masing-masing bahawa Plaintif telah menerima pembayaran daripada pihak Defendan atas dasar prasangka sedangkan pembayaran tersebut telah dibuat melalui pegawai Plaintif, iaitu, Mr. Daniel Siow;
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> (b) Adalah sesuatu yang meragukan bagi deponen Plaintif, iaitu, Paul Lo Kean Poh yang telah menegaskan di dalam afidavit-afidavit yang diikrarkan olehnya pada 2.12.2005 dan 24.1.2006 masing-masing bahawa Plaintif telah menerima pembayaran daripada pihak Defendan atas dasar prasangka melalui pegawai Plaintif, iaitu, Mr. Daniel Siow sedangkan Plaintif dan/atau Mr. Daniel Siow tidak memaklumkan kepada Defendan sama ada secara bertulis atau sebaliknya bahawa Plaintiff telah menyimpan haknya untuk memulakan tindakan undang-undang terhadap Defendan; dan

(c) Bahawa deponen Plaintif, iaitu, Paul Lo Kean Poh tidak mempunyai pengetahuan peribadi mengenai pembayaran yang dibuat oleh Defendan sebagaimana yang dinyatakan di atas.

[11] The learned counsel for the defendant in support of his application refers to the judgment of Salleh Abas FJ (as he then was) in *Leisure & Allied Industries Pty. Ltd. v. Udaria Sdn. Bhd.* [1979] 1 LNS 42:

> In the meantime, the respondent applied by Summons-in-Chambers under Order 38 Rule 1 to cross-examine the two witnesses concerned, or their affidavits should not be used at the hearing of the appellant's application for judgment under Order 32 Rule 6, and I had the misfortune to hear the respondent's application. Counsel for the respondent urged me to grant the application because the cross-examination would relate to the question how the respondent would or would not be liable for the loss or untraceability of the container hired by the appellant in an agreement with a third party and for which the respondent was not liable. The respondent's application as also supported by the affidavit of the respondent's office manager who swore it on November 11 and December 15, 1978, challenging the truth of the affidavits of Mr. Malcolm D. Steinberg and Mr. Chen Kah Leng. On the other hand, counsel for the appellant in opposing the application directed my attention to the respondent's admission through its counsel of its responsibility for the loss in a letter dated October 15, 1975, although the letter was clearly marked "without prejudice."
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> To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction *(Re Lucas)*; "otherwise foreigners would have an advantage" *(Strauss v. Goldschmidt)*. It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit much be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings *(Allen v. Allen)*. In view of the appellant's application for judgment under Order 32 Rule 6, I am not, however, prepared to hold the respondent's application to cross-examine the appellant's witnesses as being without just cause or motivated by desire to delay the proceedings or without *bona fide* or sham or vexatious.

> I am not dealing with the merits of the appellant's application for judgment under Order 32 Rule 6, but in order to enable me to exercise my discretion as regards the respondent's application to cross-examine the appellant's witnesses, it is necessary for me to see how the proposed cross-examination would be relevant to the issue in the appellant's application. An examination of this issue is therefore essential.

[12] As I have said, I have dismissed the appeal with costs. In my view, notwithstanding the provision of O. 38 r. 2(3), as a matter of principle, such an application, whether by the plaintiff or by the defendant, should not be allowed in an O. 14 proceeding. For it would defeat the purpose of an O. 14 application for summary judgment if the parties were to be allowed to cross-examine the deponents of affidavits. An O. 14 application is meant to be a simple and speedy procedure and not a protracted one – which would be the case if the cross-examinations of deponents of affidavits are allowed. In the case of a defendant, the reason to refuse such an application is even stronger. For, the legal burden on the defence is, compared to the plaintiff, lighter. In an O. 14 application, the defence, in opposing the application, need not have to establish facts or to demolish assertions of the plaintiff: all that the defendant needs to do in order to succeed in resisting the plaintiff's application is merely to convince the court that there are triable issues; and this can be accomplished merely by means of adducing material and credible affidavit evidence.

[13] In my view, the judgment in *Liesure and Allied Industries* is irrelevant as that case does not concern an O. 14 application.

[14] I find support for the view that I take in the English Court of Appeal judgment in *The Cyprus Popular Bank Limited v. Androulla Michael* [1987] CLY 3097 wherein May LJ in delivering the judgment of the court said:

> Before I turn to the real point of the appeal, which was the illegality to which I have made brief reference already, there was one further question which Mr Ashe-Lincoln raised on behalf of Mr Michael which it will be apparent could not have been taken below from its very nature. The learned judge had before him, in addition to the first action for the money claim, also the third action relating to the mortgages. In the latter evidence had been given in the normal way on affidavit, the relevant provision in the Rules being Order 38, Rule 2(3). That is in these terms, so far

as material: "In any cause or matter begun by originating summons, originating motion or petition and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

That sub-rule clearly gives the court a discretion to decide whether, on applications made in a relevant proceeding, cross-examination on the affidavits will be allowed. Mr Ashe-Lincoln did seek leave to cross-examine the deponents of the affidavits put in on behalf of the Bank when the matter came before the learned judge below. This the learned judge refused, and he recorded the reasons for his refusal in this way in his judgment, at page 8 of the transcript: "Mr Lincoln indeed sought leave to cross-examine the Bank's deponents. I did not allow that because to my mind the Order 14 procedure is not designed for a mini-trial with cross-examination. It is for the plaintiff to verify his claim and swear to the absence of any defence; it is for the defendant to set out his case in his affidavit, condescending to particularity, so that the court can be satisfied that there is indeed something which ought to go to trial."

Insofar as the judge refused to allow cross-examination in the Order 14 proceedings, in my judgment he was wholly right so to do and I entirely agree with his reason not to allow it.

[Appeal dismissed with costs.]